STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2006
v	No. 252310 Wayne Circuit Court
STEVEN CHRISTOPHER MAIER, Defendant-Appellant.	LC No. 02-013543-01

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of first-degree felony murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, first-degree criminal sexual conduct, MCL 750.520b, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison without parole for each of the four murder convictions, parolable life in prison for the assault with intent to commit murder conviction, and 200 to 300 months' imprisonment for the first-degree CSC conviction, those sentences to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We vacate two of the first-degree murder convictions and sentences, as well as the first-degree CSC conviction and sentence, and affirm defendant's remaining convictions and sentences.

I

Defendant was convicted of murdering his friend, John Swinea, and Swinea's younger daughter after returning home during in the early morning hours of July 6, 2002, after a night of drinking. After Swinea fell asleep, defendant attempted to sexually assault Swinea's older daughter, JS, who was sleeping. When JS awoke and began screaming, defendant left the room, obtained Swinea's shotgun, and shot and killed Swinea and his younger daughter while they slept in their beds. He thereafter sexually assaulted JS, and shot her in the head. JS, who survived the shooting, testified at trial that defendant's crime spree began at approximately 3:00 a.m., and ended approximately two hours later.

Michigan State Police Trooper Michael Cahalan came in contact with defendant at 8:00 a.m. the same day, after defendant was involved in a rollover accident while driving Swinea's car. Cahalan suspected that defendant had been drinking, but was unaware of the shootings at

the Swinea house, and he had no reason to suspect defendant of any non-vehicular offense. Defendant told Cahalan that he had some "f***ing shit" to tell him, and advised Cahalan to handcuff and arrest him. Cahalan asked defendant what he meant, and defendant told him that he had murdered three people. Cahalan asked defendant whom he had killed, and where, and defendant gave him the Swineas' address. Cahalan contacted the Garden City Police and asked them to check the house. When the police notified Cahalan that there had been three shootings at the house, two of them fatal, Cahalan advised defendant of his *Miranda*[1] rights and continued questioning him. Defendant admitted that he shot Swinea and his daughters. Later that day, defendant admitted his guilt to Kimberly Scott, the Deputy Chief of Police of the Garden City Police Department. Defendant stated that he had been intoxicated, and that he remembered very little of the events because he had a blackout.

Defendant's blood alcohol level at 12:50 p.m. on July 6, 2002, was 0.04 grams. His hands tested positive for gunshot residue. Sperm found on JS's body matched defendant's DNA profile.

II

Defendant first argues that the trial court erred by denying his motion to suppress his statements to Trooper Cahalan and Deputy Chief Scott. He argues that Cahalan used a constitutionally improper "question first" technique to elicit an incriminating response before advising him of his *Miranda* rights. We disagree.

It is well established that the police may not interrogate a suspect in custody without first advising him of his Fifth Amendment right against self-incrimination. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Attebury*, 463 Mich 662, 668-669; 624 NW2d 912 (2001). Statements obtained through custodial interrogation are inadmissible to prove a defendant's guilt if the officer did not first advise him of his *Miranda* rights. *Id.* *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987); *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Yarborough v Alvarado*, 541 US 652, 661; 124 S Ct 2140; 158 L Ed 2d 938 (2004); *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Under *Miranda,* the term "interrogation" encompasses only "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." *People v Honeyman*, 215 Mich App 687, 695; 546 NW2d 719 (1996), quoting *Rhode Island v Innis*, 446 US 291, 302; 100 S Ct 1682; 64 L Ed 2d 297 (1980). But volunteered statements of any kind are not barred by the Fifth Amendment and are admissible. *Miranda, supra* at 478; *Innis, supra* at 300; *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995).

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Here, there was no custodial interrogation before Cahalan advised defendant of his *Miranda* rights. Defendant's initial statement that he had some "f***ing shit" to tell the officers was a volunteered statement, outside the scope of *Miranda*. Although defendant did not initiate contact with the officers when they were dispatched to the accident scene, the statement was not responsive to any question the officers asked. Moreover, a motorist detained for a routine traffic stop is not in custody within the meaning of *Miranda*. *Berkemer v McCarty*, 468 US 420, 440; 104 S Ct 3138; 82 L Ed 2d 317 (1984); *People v Burton*, 252 Mich App 130, 138-139; 651 NW2d 143 (2002).

After defendant voluntarily made a vague allusion to criminal conduct, Cahalan permissibly asked follow-up questions to clarify what he meant. In *People v Dorner*, 66 Mich App 298; 238 NW2d 845 (1975), this Court held that a police officer was not required to advise a defendant of his rights before asking the defendant to explain what he meant when he said that suspicious items in his car were "selling like hotcakes." This Court explained that the police officer's question was a natural and spontaneous response to the defendant's volunteered statement, and that the police officer was not attempting to elicit an incriminating statement because he did not know if a crime had been committed. *Id.* at 307. The Court further noted that the questions took place in the noncoercive, noncustodial setting of a traffic stop. *Id.*

The rationale of *Dorner* is equally applicable to this case. Trooper Cahalan was not focusing on defendant as a suspect when he asked him to clarify his statement, and he was not attempting to solicit incriminatory statements, because he did not know about the Swinea shootings or suspect that defendant had committed any other offense. Accordingly, he was not required to advise defendant of his *Miranda* rights before he followed up to determine what defendant meant by his volunteered statement. Defendant's reliance on *Missouri v Seibert*, 542 US 600; 124 S Ct 2601; 159 L Ed 2d 643 (2004), is misplaced. The significant factor in *Seibert*—that the officer purposefully conducted a custodial interrogation to elicit incriminating statements to use in the post-warning interrogation—is not present in this case. Accordingly, the trial court did not err in denying defendant's motion to suppress his statements.

III

Defendant also argues that there was insufficient evidence of premeditation and deliberation to support his convictions of first-degree premeditated murder. We disagree.

When a defendant challenges the sufficiency of the evidence, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

To prove first-degree murder, the prosecutor must show that the defendant killed the victim, and that the killing was willful, deliberate, and premeditated. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002); MCL 750.316(1)(a). Premeditation means thinking about the act beforehand, and deliberation means measuring and evaluating the major facets of a choice. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Factors that may be considered to prove premeditation include (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the homicide, including the choice of weapon and the location of the wounds inflicted. *Id.*

Defendant contends that he was too intoxicated to think about his acts beforehand, or to evaluate the facets of his decisions. Before our Legislature abrogated the intoxication defense, intoxication was a valid defense only if the defendant's intoxication was so great as to render him incapable of forming the requisite intent.[2] *People v Gomez*, 229 Mich App 329, 332; 581 NW2d 289 (1998). With respect to first-degree murder, intoxication could negate the element of premeditation and reduce the degree of the offense to second-degree murder. *Plummer*, *supra* at 646-647, 651.

Here, however, there was sufficient evidence to enable the jury to find that defendant was able to think about and comprehend his actions during his crime spree at the Swinea household. JS testified that the series of offenses took place over a two-hour period, giving defendant sufficient opportunity to reflect on his behavior. The jury could have also found that defendant's conduct revealed a purposeful plan to kill Swinea and his younger daughter before sexually assaulting and killing JS, and that the sexual assaults and shootings were not the random, arbitrary, and unrelated acts of a person driven solely by unreasoned impulse. The evidence that defendant aimed the shotgun close to the victims' faces, at the same level as their reclining figures, supports a finding that defendant had the capacity to evaluate and comprehend his actions. This evidence was sufficient to support defendant's convictions.

IV

Defendant argues that the trial court's special instruction on felony murder was erroneous. We disagree. We reviews jury instructions in their entirety to determine whether there is error requiring reversal. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). We will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

Defendant claims that the trial court's felony murder instruction was based on a "transactional approach" to felony murder that our Supreme Court discussed in *People v Podolski*, 332 Mich 508, 515-518; 52 NW2d 201 (1952), but later rejected in *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002). Defendant misreads the Supreme Court's decision in *Randolph*. In *Randolph*, the Court rejected the "transactional approach" to *robbery* cases, i.e., it rejected the theory that a robbery is not completed until the defendant escapes with the stolen goods to a place of safety. *Id.* at 540-541, 547. The Court specifically explained that the *Podolski* analysis of felony murder did not authorize the "transactional approach" to robbery. *Id.* at 549-550. Accordingly, the holding in *Podolski*, to the extent that it discusses the causal connection between the underlying felony and the homicide for purposes of felony murder, was not affected by *Randolph*.

Defendant also argues that the trial court erred when it instructed the jury that the causal connection between the underlying felony and the homicide can be proven "even if there was a 15-minute time period between the underlying felony and the homicide." He argues that this

[2] The Legislature abrogated the intoxication defense when it enacted MCL 768.37, but this statute did not take effect until September 1, 2002, after the crimes in this case.

instruction overemphasized temporal proximity, and encouraged the jurors to convict defendant based on the timing of the underlying felony and homicide, even if the two events were not otherwise related. We disagree. The trial court merely explained that a short time lag between a murder and the underlying felony does not preclude a finding of a close connection between the two. The court instructed the jury that in order to establish felony murder, the murder and the sexual assault must be "closely connected in terms of time, place, and causal connection." But the court further stated that "[f]elony murder requires that when the defendant caused the death of John and Stephanie Swinea, he was in the perpetration or attempted perpetration of criminal sexual conduct first degree." Jurors are presumed to follow the trial court's instructions. *People v Houston*, 261 Mich App 463, 469; 683 NW2d 192 (2004), aff'd 473 Mich 399 (2005). Viewed as a whole, the trial court's jury instructions were not improper.

V

Defendant next argues that the trial court erred in denying his request for an instruction on the lesser included offense of assault with intent to commit great bodily harm. We disagree.

A defendant is entitled to an instruction on a lesser included offense if the lesser offense is necessarily included in the greater offense, and if a rational view of the evidence would support giving the instruction. *People v Wilson*, 265 Mich App 386, 395; 695 NW2d 351 (2005). Assault with intent to do great bodily harm less than murder is a necessarily included lesser offense of assault with intent to commit murder. *People v Mendoza*, 468 Mich 527, 532 n 3; 664 NW2d 685 (2003); *People v Brown*, 267 Mich App 141, 150; 703 NW2d 230 (2005).

Here, however, an instruction on assault with intent to do great bodily harm less than murder was not rationally supported by the evidence. The evidence showed that defendant fatally shot two of JS's family members while they were lying in their beds, and then shot JS in the head after sexually assaulting her. Under these circumstances, the jurors could not rationally conclude that defendant intended any harm less than murder. The trial court properly denied the requested instruction.

VI

Finally, defendant argues that his four convictions of first-degree murder arising from the shooting deaths of two persons, and his convictions for both felony murder and the predicate felony of first-degree CSC violate his constitutional protections against double jeopardy. We agree.

In *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001), this Court stated:

> Where dual convictions of first-degree premeditated murder and first-degree felony murder arise out of the death of a single victim, the dual convictions violate double jeopardy. *People v Bigelow*, 229 Mich App 218, 220-222, 581 NW2d 744 (1998). The proper remedy is to modify the judgment of conviction and sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder. *Id.* at 220-221. Likewise, defendant's convictions and

> sentences for both felony murder and the underlying felony of kidnapping violate his right against double jeopardy. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). The proper remedy is to vacate the conviction and sentence for the underlying felony. *Id.* at 259-260.

Accordingly, we vacate defendant's conviction and sentence for criminal sexual conduct, and we additionally vacate two of his convictions and sentences for first-degree murder and remand this case for amendment of the judgment of sentence to specify that defendant stands convicted of two counts of first-degree murder, each supported by two alternative theories, premeditated murder and felony murder.

Affirmed in part, vacated in part, and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly